

(1)

P E T I T I O N

F O R

S I R M U N G O S T I R L I N G O F G L O R A T

Against

Mr. H U G H B L A I R.

MY Lords of Council and Session, unto your Lordships humbly means and shews, Your Servitour Sir *Mungo Stirling of Glorat*; that wherein the Process at the Instance of Mr. *Hugh Blair* against me, your Lordships have found me lyable for the Sums Lybelled; and likewise in vast Expenses not only Alledged debursed by Mr. *Hugh* my only party, but by *Colgrain*, with whom I have nothing to do; my Lawiers perswade me that I have not only a probable ground to defend my self, but that my defences are unquestionably founded in Law, and that if I can but obtain particular Interloquitors upon my defences, or a hearing in your own Presence, the variety of the points and grounds in Law represented, justly requiring the same; I will and must infallibly prevail, notwithstanding of your former Interloquitors, which are general, and not adapted to my Defences.

I am sorry I should be Necessitate to apply now so near the end of the Session, but the occasion of my delay since the last Interloquitor was a Bill of *Colgrains*, in which he Complained that I had invaded him, and obtained a Warrant to take Tryal thereof.

I have nothing to do with *Colgrain*, he is neither Pursuer nor Defender in the Cause; and how he pretends to enter in this Process I cannot till this Moment understand, but I need be little concerned, seing his Complaint is not proven, as I shall be ready to clear if he do insist upon it; as also I will clear that he is not my Party, nor in the case of the Act of Parliament.

I shall therefore beg liberty to lay my Defences shortly and clearly before your Lordships, resolving to acquiesce in your Lordships Decision, when ever you shall be pleased to Sustain or Repel my Defences. Particularly I do therefore alledge, 1^{mo} That the Ground of the Debt being a Pursute upon a Bond, wherein my Father was one of Three Cautioners, I prove by the Pursuers Title in the Process, that he was once denuded in favours of *Kinkaid* of that Ilk, one of the three Cautioners, whereby my Lawyers perswade me that the debt became outerly extinct as to a third part, and consequently that debt could never be revived against my Father nor me, by any deed of the said *Kinkaid* or the Principal Creditor.

If ever this defence was repelled, I shall submit, but I must say, that the Pursuer hath not, nor is able to offer any instance in practice, or reason in Law for repelling the same.

2^{do}. The Debt coming in the Person of a Cautioner, I peremptorly and positively contend, that the Action for the other two part was divided; and albeit my Father was Originally lyable in *Solidum* to the Creditor, yet how soon the Right came in the Person of a Co-cautioner, my Father had *Beneficium devisionis* the other Co-cautioner being Solvent. This being an undoubted Principle in Law, and which I am assured has never been contraverted, That one of the Co-cautioners, who are lyable mutually to relieve one another, can never pursue the other Cautioners for his relief in *Solidum*, but only *pro rata*.

confusion

If the third Co cautioner had been Insolvent, his share would have been divided betwixt my Father and *Kincaid*, and so my Father would have been lyable for the half, and now that he is Solvent, the Co-cautioner can only recur upon my Father for the one third, and upon the other Co-cautioner for the other third. For it is to be understood, tho it is not *Kincaid* the Co-cautioner who is Pursuing, but Mr. *Hugh* who was once the Creditor, yet now Mr. *Hugh* has no other Title, but a Retrocession from *Kincaid*, and so is every way in *Kincaid's* place, and whatever was competent to the rest of the Cautioners against *Kincaid*, is also competent against the Pursuer who only now sustains his person.

3tio. *Et separatim*, I offer a separate and new defence, viz. After the pursuer was denuded in Favours of *Kincaid*, the principal Debitor *Kirkcoun*, who was lyable to relieve *Kincaid* of the whole, was imprisoned by him upon the Caption raised by Mr. *Hugh Blair* the Creditor, and Mr. *Hugh* did most illegally set the prisoner at Liberty by a Warrant under his hand.

Kincaid understanding this, did Commence a process against the Magistrates in which Mr. *Hugh* was called, who finding that he would be reached, took a Retrocession from *Kincaid*; all which matter of Fact I offer to prove by the pursuers Oath.

The Matter of Fact being established, the defence in Law is this, That the Pursuer having liberat the Principal Debitor, he was lyable to *Kincaid* in the same way as the Principal would have been lyable, and consequently the Right coming in his person, the debt was extinct as to all the Cautioners: For this I take for granted, that the Pursuer being lyable to relieve one of the Cautioners *in solidum*, because of his taking upon him to set at liberty the Principal Debitor, and having relieved him accordingly, the Debt is extinct not only as to that Cautioner, but as to the whole, considering that the ground of the Pursuers obligation to relieve, was his setting the Principal Debitor at liberty, who would have Relieved the whole Cautioners.

Expromissor

I shall only remove two difficulties which occurred to some of your Lordships at advising. 1mo It was suggested, that I was Expromissor, and in a worse condition than my Father would have been. 2do. There was an alledgeance of Compensation of any claim my Father could have to recur against the Principal, In Answer to these suggestions, I also begg your Lordships Interloquitors on my Replis.

1mo. I am overtaken upon a Letter, by which I intreat the Creditor to forbear Diligence against my Father, which your Lordships have constructed an Obligation to pay the Debt, and I do not now reclame, but how that Constructive Obligation can be interpreted to import any more than an *ad promissio*, or a Cautionary Obligation, that I can never understand: For, it is known to your Lordships that *ex promissio fit liberato principali debitore*, and *ad promissio* is an accessory and Cautionary Obligation: And I am confident your Lordships would never think but that after my Letter, the principal Debitor my Father and other Co-cautioners remained bound to the Creditor, and therefore I can never be reckoned Expromissor.

Adpromissor

2do. I positively affirm, That I as *Adpromissor*, and so a Cautioner, have *beneficium cedendarum actionem* against my Fathers proper Estate, and against the Co-cautioners, for I am not bound to personat him or to be Subject to what might be alledged against him.

Compensation

As to the Compensation, I cannot understand it: For the Case is this, the pursuer insists for his Debt, I crave an Assignation supposing I were lyable to recur against my Father and his Co-cautioners. The Pursuer replies, on a Comper:

sation, on a Debt of my Fathers as Executor to McFarland the principal Debitor, how can this meet me? for I am seeking nothing from Mr. *Hugh Blair*, who pretends to] Compence me, nor do I represent my Father, and I know no other party in the Field but Mr. *Hugh Blair*, nor can I understand, how a pretended Compensation in the person of Mr. *Hugh Blair*, can eeced an Obligment to Assign, let the Persons who may be lyable to my relief, provide themselves with a defence of Compensation, or any other defence they please, but, how the Pursuer of whom I ask nothing, can compense me, is a Mistry?

2do. Your Lordships may remember, I alledged the Debt was Heretable, and not Confirmable, in so far, as there was an Adjudication led for it.

To which the Pursuer Answered, That the bygone Annualrents were moveable, which I might and do deny. For I contend, that an Adjudication with all the Consequences of it, falls to an Heir. But 2do. I condescend and offers me to prove the bygone Annualrents satisfyed and Payed, or Recompenced by the few Dutys of the Lands of *Kirktown*, who held of my Father, which payed 100 lib: Yearly, and by another peice of Ground paying 50 Merks Yearly of my Fathers Estate posselt by *Kirktown* during my Fathers Life, and my Receipts of 1000 lib. produced.

Herefore I most humbly beseech your Lordships to pronounce particular Interlocutors upon my Defences, which my Lawyers perswade me cannot be Repelled. 1mo. The Debt libelled became extinct quoad a third part, by coming in the person of *Kincaid* the Co-cautioner. 2do. The Action for the two part was divided. 3tio. The Action for the whole was extinct, by the Pursuers setting the principal Debitor at liberty, after he was denuded, which is New, and not formerly under your Lordships Consideration: And likeways that your Lordships would Repell the Answer, pretending that I am an Expromissor, and the Compensation founded on, as not being Competent by a Party of whom I claim nothing, and in regard the Debt is Heretable and the whole Annualrents payed: And therefore that your Lordships would not only Assoilzie me from Expenses, as having a just Ground to Defend, but also from the Procefs. And if any difficulty remain, That your Lordships would allow me an Hearing in your own presence, that the Matter may be more perfectly Understood and clearly Determined. And likeways to Hear me upon *Colgrain's* Complaint, if he do insist. ✓

